

A
ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

2008 OCT 23 PM 3:45

CLERK OF COURT

**FLAVIO AGUIRRE,
Individually**

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CIVIL ACTION NO.

Plaintiff,

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§
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§
§

4:08-CV-479-A

v.

**JOSE AGUIRRE d/b/a – Aguirre's Auto
Sales and Service**

§
§
§
§

Defendant.

Appendix to Brief in Support of Motion for Summary Judgment

INDEX OF EXHIBITS

- A. Plaintiff's Original Complaint
- B. Affidavit of Plaintiff
- C. Assumed Names records
- D. Affidavit of Fees & Costs

TABLE OF AUTHORITIES

Statutory

Fair Labor Standards Act (“FLSA”) (29 U.S.C. §§ 206, 207, and 215 (a)(2) & (3).
Section 203(d)
Section 3(s)(1)
Section 203(s)(1)
Section 16(b) of the FLSA

Cases

McLaughlin v. Richland Shoe Co., 486 U.S. 128, 132, 108 S.Ct. 1677, 1680-81, 100 L.Ed.2d 115 (1988).

Texas Farm Prods. Co. v. Williams, 406 S.W.2d 256, 259 (Tex.Civ.App.-Tyler 1966, writ ref'd n.r.e.), cert. denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967).

Robertson v. Alaska Juneau Gold Mining Co., 157 F.2d 876, 878 (9th Cir.1946), cert. den., 331 U.S. 823, 67 S.Ct. 1314 91 L.Ed. 1839 (1947), vacated on other grounds, 331 U.S. 793, 67 S.Ct. 1728 91 L.Ed. 1821 (1947).

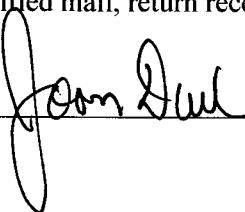
Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 41, 65 S.Ct. 11, 13, 89 L.Ed.2d 29 (1944).

Nelson v. Alabama Inst. For Deaf & Blind, 896 F.Supp. 1108, 1113-14 (N.D.Ala.1995)

Cole v. Farm Fresh Poultry, Inc., 824 F.2d 923, 927 (11th Cir.1987);

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was served by certified mail, return receipt requested on the Defendant this 21 th day of October, 2008.


John Dail

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

2008 AUG 12 AM 11:18

CLERK OF COURT

FLAVIO AGUIRRE, on his behalf §
 and on behalf on those similarly situated, §
 Plaintiff, §
 v. §
 JOSE AGUIRRE d/b/c – Aguirres Auto §
 Sales and Service §
 §

CIVIL ACTION NO.

4-08-cv-479-A

JURY DEMANDED

COLLECTIVE ACTION

Defendant.

PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff brings this action against Defendant Jose Aguirre d/b/c – Aguirres Auto Sales and Service and would show as follows:

I. OVERVIEW

1. Defendants have failed to pay Plaintiff (and those similarly situated to him) in accordance with the Fair Labor Standards Act. Specifically, Defendants failed to accurately track and pay for all hours Plaintiff worked and failed to pay Plaintiff time-and-a-half of his regular rate of pay for all hours he worked in excess of 40 hours per workweek. Plaintiff brings this action as a collective action pursuant to 29 U.S.C. § 216(b). Additionally, Defendants have engaged in unlawful retaliation against Plaintiff by terminating him. He took protected action by telling Defendant that his paycheck bounced and the Department of Labor had told him he was entitled to be paid timely.

II. PARTIES

2. Plaintiff is an individual who resides in Tarrant County, Texas.

Plaintiff's Original Complaint

Ex. A pg. 1

3. Defendant Jose Aguirre d/b/c – Aguirres Auto Sales and Service is an individual and sole proprietor ship with its principal place of business at 3725 Hemphill Rd, Fort Worth, Texas 76110 and can be served at that address.

III. JURISDICTION

4. This Court had jurisdiction over Defendants because Defendants reside within this District and Plaintiff has asserted a claim arising under federal law.

IV. VENUE

5. Venue is proper in the Northern District of Texas because the events forming the basis of the suit occurred in this District.

V. COVERAGE

6. At all times hereinafter mentioned, Defendants have been employers within the meaning of the section 3(d) of the FLSA, 29 U.S.C. § 203(d).

7. At all times hereinafter mentioned, Defendants have been an enterprise within the meaning of Section 3(r) of the FLSA, 29 U.S.C. § 203(r).

8. At all time hereinafter mentioned, Defendants have been an enterprise engaged in interstate commerce or in the production of goods for commerce within the meaning of Section 3(s)(1) of the FLSA, 29 U.S.C. § 203(s)(1), in that said enterprise has had employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person and in that said enterprise has had and on information and belief had between his related and associated entities an annual gross volume of sales made or business done of not less than \$500,000.

9. At all times hereinafter mentioned, Plaintiff was an individual employee who was engaged in commerce or in the production of goods for commerce as required by 29 U.S.C. §§ 206-207.

VI. FACTS

10. Plaintiff was employed by Defendants as a mechanic in the Service Department. Defendants fail to accurately track the hours of work for Plaintiff and all those similarly situated. Plaintiff routinely works in excess of 40 hours per week, specifically his work hours were 10.5 hours daily 6 days a week for 15 years with no vacation.

11. Plaintiff was not paid overtime for all hours he worked in excess of 40 in a workweek as required by law and in fact was paid a flat rate of \$400 weekly.

12. On or about February 2008, Defendant bounced paycheck to Plaintiff who then learned that he was required to be given good funds to pay his wages in a timely manner after the close of the pay period and that due to the NSF check he had not been paid timely and he desired prompt payment.

13. Plaintiff is aware of other current and former employees who are similarly in that they have worked in excess of 40 hours per workweek but were not paid for their hours of work in accordance with the FLSA.

**VII. COUNT ONE: FAILURE TO PAY WAGES IN
ACCORDANCE WITH THE FAIR LABOR STANDARDS ACT**

14. During the relevant period, Defendants have violated and are violating the provisions of Section 6 and/or 7 of the FLSA, 29 U.S.C. §§ 206, 207, and 215(a)(2), by employing employees in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the FLSA as aforesaid, for workweeks longer than forty hours per week at rates no less than one and one-half the regular rates for which they were employed. Defendants have acted willfully in failing to pay Plaintiff in accordance with the law.

VIII. COUNT TWO: RETALIATION UNDER THE FLSA

15. Plaintiff incorporates all previous paragraphs as if fully set forth herein.

16. Defendant unlawfully retaliated against Plaintiff in violation of 29 U.S.C. §215(a)(3) of the FLSA. Accordingly, Plaintiff is entitled to compensatory damages and punitive damages.

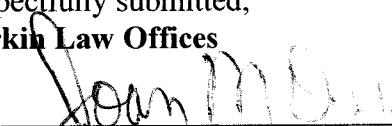
IX. RELIEF SOUGHT

17. WHEREFORE, cause having been shown, Plaintiff prays for judgment against Defendants as follows:

a. For an Order pursuant to Section 16(b) of the FLSA finding Defendants liable for unpaid back wages due to plaintiff (and those who later join the suit) and for liquidated damages equal in the amount to the unpaid compensation found due to the Plaintiff; and

- b. For an Order awarding the plaintiff (and those who later join in the suit) the cost of this action;
- c. For an Order awarding Plaintiff (and those who later join the suit) their attorney fees; and
- d. For and Order awarding the Plaintiff (and those who later join the suit) pre-judgment and post-judgment interest at the highest rates allowed by law; and
- e. For and Order granting such other and further relief as may be necessary and appropriate.

Respectfully submitted,
Durkin Law Offices

By: 

Joan M. Durkin
Texas Bar No. 06287030
669 Airport Freeway, Suite 107
Hurst, TX 76053
Tel. (817)545-9700
Fax. (817)545-5071

VERIFICATION

STATE OF TEXAS §
COUNTY OF TARRANT §

My name is Flavio Aguirre I am an Adult who has personal knowledge of the facts set forth on this complaint. I have read the complaint and verify that the facts are true and correct to the best of my knowledge and belief.

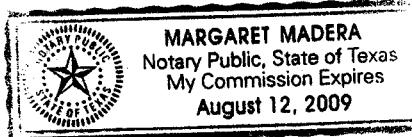
Flavio Aguirre

Flavio Aguirre

Sworn and Subscribed to Before me by Flavio Aguirre this 6th day of August 2008.

Margaret Madura

Notary Public in and for the State of Texas



Plaintiff's Original Complaint

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION**

**FLAVIO AGUIRRE,
Individually**

CIVIL ACTION NO.

Plaintiff,

4:08-CV-479-A

JOSE AGUIRRE d/b/a – Aguirre's Auto Sales and Service

Defendant.

AFFIDAVIT OF FLAVIO AGUIRRE

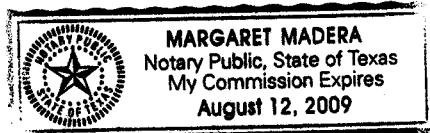
STATE OF TEXAS §
COUNTY OF TARRANT §

My name is Flavio Aguirre I am an Adult over the age of 18 and have not been convicted of a felony. I have personal knowledge of the facts set forth on this Motion for Summary Judgment . I have read the facts about the work I did, the hours I worked, the pay I received, the different types of business that was engaged in and the other facts set forth herein and I do verify that the facts are within my personal knowledge and are true and correct.

Flavio Aguirre

Sworn and Subscribed to Before me by Flavio Aguirre this 1 day of October 2008.

Notary Public in and for the State of Texas



ASSUMED NAME RECORDS

CERTIFICATE OF OWNERSHIP FOR UNINCORPORATED BUSINESS OR PROFESSION

NOTICE: "CERTIFICATES OF OWNERSHIP" ARE VALID ONLY FOR A PERIOD NOT TO EXCEED 10 YEARS FROM THE DATE FILED
IN THE COUNTY CLERK'S OFFICE. (Chapter 38, Title 4 - Business and Commerce Code)

(This certificate properly executed is to be filed immediately with the County Clerk.)

NAME IN WHICH BUSINESS IS OR WILL BE CONDUCTED

Beast Performance

(print or type)

BUSINESS ADDRESS: 3725 Hemphill St.

CITY: Ft. Worth STATE: TX ZIP CODE: 76116

PERIOD (not to exceed 10 years) DURING WHICH ASSUMED NAME WILL BE USED: 10 yrs

BUSINESS IS TO BE CONDUCTED AS (Check Which One): Proprietorship Sole Practitioner Joint Venture
 General Partnership Limited Partnership Real Estate Investment Trust
 Joint Stock Company Other (name type) JA

CERTIFICATE OF OWNERSHIP

I/We, the undersigned, are the owner(s) of the above business and my/our name(s) and address(es) given
is/are true and correct, and there is/are no ownership(s) in said business other than those listed herein below.

- NAMES OF OWNERS -

NAME: Jose J. Aguirre

SIGNATURE



(print or type)

Address: 4909 CL 1022

Cleburne

TX

Zip Code: 76033

NAME: _____

SIGNATURE: _____

Address: _____

Zip Code: _____

NAME: SC

SIGNATURE: _____

Address: _____

Zip Code: _____

NAME: MD

SIGNATURE: _____

Address: _____

Zip Code: _____

NAME: SC

SIGNATURE: _____

Address: _____

Zip Code: _____

THE STATE OF TEXAS)

)

COUNTY OF TARRANT)

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared:

Jose Jorge Aguirre TX DL

known to me to be the person whose name is/are subscribed to the foregoing instrument and acknowledged to me that he
are the owner(s) of the above-named business and that he signed the same for the purpose and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, on November 8, 2008



TRUE AND CORRECT COPY OF
ORIGINAL RECORD FILED IN
TARRANT COUNTY, TEXAS
SUZANNE HENDERSON, COUNTY CLERK

Notary Public in and for Tarrant County, Texas

SUZANNE HENDERSON, COUNTY CLERK

By Jimmy E. Eason, Deputy



CC-9 Revised 4/08
GPC-1035

Ex. C pg. 1

**TARRANT COUNTY COURTHOUSE
100 W. WEATHERFORD
FORT WORTH, TX 76196
(817) 884-1195**

Customer: AGUIRRE, JOSE J

Page 1 of 1

Receipt #: 528738

Date: 11/08/2006 02:35 PM

Department: VITAL RECORDS

Work Station: CCTC035313

Instrument #	Description	Pages	Quantity	Amount
A206017424	A/N	1	1	\$20.00
A206017425	A/N	1	1	\$20.00
<hr/>				Total: \$40.00

Payments:

CASH	\$50.00
Total Payments:	\$50.00
Change Issued:	\$10.00



TRUE AND CORRECT COPY OF
ORIGINAL RECORD FILED IN
TARRANT COUNTY, TEXAS
SUZANNE HENDERSON, COUNTY CLERK

**THANK YOU
SUZANNE HENDERSON
COUNTY CLERK**

Ex. C pg. 2

A206017425

Case 4:08-cv-00479-A Document 15 Filed 10/23/08 Page 11 of 15 PageID 68
SUZANNE HENDERSON, COUNTY CLERK
TARRANT COUNTY, TEXAS

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IN THE COUNTY CLERK'S OFFICE. (Chapter 36, Title 4 - Business and Commerce Code)

(This certificate properly executed is to be filed immediately with the County Clerk.)

* * * *

NAME IN WHICH BUSINESS IS OR WILL BE CONDUCTED

AGUIRRE'S

Garage

(print or type)

BUSINESS ADDRESS: 3725 Hemphill

CITY: Ft Worth

STATE: TX

ZIP CODE: 76110

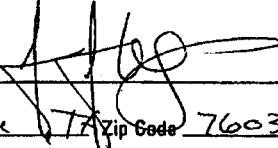
PERIOD (not to exceed 10 years) DURING WHICH ASSUMED NAME WILL BE USED: 10 yrs

BUSINESS IS TO BE CONDUCTED AS (Check Which One): Proprietorship Sole Practitioner Joint Venture
 General Partnership Limited Partnership Real Estate Investment Trust
 Joint Stock Company Other (name type)

CERTIFICATE OF OWNERSHIP

I/We, the undersigned, are the owner(s) of the above business and my/our name and address given
is/are true and correct, and there is/are no ownership(s) in said business other than those listed herein below.

- NAMES OF OWNERS -

NAME: Jose Jorge Aguirre SIGNATURE: 
(print or type)

Address: 3725 4409 CL 1022 Cleburne TX Zip Code: 76033

NAME: SIGNATURE: _____
(print or type)

Address: _____ Zip Code: _____

NAME: SIGNATURE: _____
(print or type)

Address: _____ Zip Code: _____

NAME: SIGNATURE: _____
(print or type)

Address: _____ Zip Code: _____

NAME: SIGNATURE: _____
(print or type)

Address: _____ Zip Code: _____

THE STATE OF TEXAS)

)

COUNTY OF TARRANT)

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared

Jose Jorge Aguirre TX DC

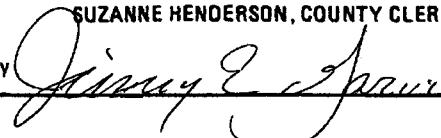
known to me to be the person(s) whose name is/are subscribed to the foregoing instrument and acknowledged to me that he
are the owner(s) of the above-named business and that he signed the same for the purpose and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, on November 8, 2008

TRUE AND CORRECT COPY OF
ORIGINAL RECORD FILED IN
TARRANT COUNTY, TEXAS
SUZANNE HENDERSON, COUNTY CLERK

Notary Public in and for Tarrant County, Texas

Suzanne Henderson, County Clerk

By  Deputy

**TARRANT COUNTY COURTHOUSE
100 W. WEATHERFORD
FORT WORTH, TX 76196
(817) 884-1195**

Customer: AGUIRRE, JOSE J

Page 1 of 1

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Change Issued:	\$10.00



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SUZANNE HENDERSON, COUNTY CLERK

**THANK YOU
SUZANNE HENDERSON
COUNTY CLERK**

Ex. C pg. 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

FLAVIO AGUIRRE,

§

Individually

§

Plaintiff,

§

v.

§

§

JOSE AGUIRRE d/b/a – Aguirre's Auto
Sales and Service

§

§

§

CIVIL ACTION NO.

4:08-CV-479-A

Defendant.

Application for Payment of Attorney Fees

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Joan Durkin, and respectfully shows the Court as follows:

1. Applicant is an attorney licensed to practice law in the State of Texas. In the above-referenced matter, Applicant has spent 13 hours on this matter prior to the hearing which is estimated to involve 1.5 hours for travel and hearing time, and incurred expenses in the amount of \$435 for filing fees and service as set forth in the itemized statement attached hereto as Exhibit A and incorporated herein for all purposes.
2. Applicant is familiar with the reasonable and customary fees charged by attorneys in FSLA proceedings in Tarrant County, Texas. In my opinion, which is based upon my 19 years experience, education and training, the amount of \$ 3000.00 is a reasonable and customary fee for the services I have provided in this matter and such fee is necessary and was incurred while representing the Plaintiff.

WHEREFORE, Applicant respectfully requests that this Court award attorney's fees and expenses in the amount of \$3,435.00 and order that such fees be paid by funds tendered by the Defendant.

Submitted this October 21, 2008.

Respectfully submitted,
Durkin Law Offices

By:

Joan M. Durkin

Texas Bar No. 06287030

669 Airport Freeway, Suite 107

Hurst, TX 76053

Tel. (817)545-9700

Fax. (817)545-5071

Certificate Of Service

I hereby certify that a true and correct copy of the foregoing instrument was served upon the Defendant by first class mail on this 21st of October 2008.

Joan M. Durkin

Texas Bar No. 06287030

669 Airport Freeway, Suite 107

Hurst, TX 76053

Tel. (817)545-9700

Fax. (817)545-5071

Date	Description	Time/Expense	Person
3/12/08	Rec'd & rev'd file	.3	JMD
3/13/08	Draft Demand Letter	1.5	JMD
8/1/08	Meeting w/client	.5	
8/5/08	Research	1.5	JMD
8/11/08	Draft Plaintiff's Original Complaint	2	JMD
10/3/08	Meeting w/Defendant & reviewing answer.	1	JMD
10/3/08	t/c with client	.3	
10/6/08	Reviewed Order Regarding Answer	.2	JMD
10/8/08	Research	1.5	JMD
10/21/08	Drafting and Preparing MSJ plus travel and estimated hearing time.	4.5	JMD